(2)

No. 99-1690

Supreme Court, U.S.
FILED
MAY 19 2000
CLERK

In The

Supreme Court of the United States

CITY OF HOUSTON,

Petitioner,

v.

JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, TRUSTEES OF THE JUDITH SUD & BETTY P. SUD TRUST, AND J. E. ROUSSEL,

Respondents.

On Petition For A Writ of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction or should it exercise discretionary certiorari authority to review a state court case that does not involve any claim under the federal constitution or other federal law and in which no federal question was timely or properly raised at any stage of the state court proceedings?

2. Should this Court review a final decision of the Texas courts determining the case to be "ripe" when only state constitutional claims are present?

CORPORATE DISCLOSURE STATEMENT

Respondent B. Red, Inc. is a privately held corporation and no publicly held company owns any of its stock.

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JURISDICTION

This Court does not have jurisdiction of this case pursuant to 28 U.S.C. § 1257(a). Petitioner has not stated when a federal question was raised or the manner in which it was raised, as required by Rule 14(g)(i) of the Rules of the Supreme Court of the United States. The claims pursued at the trial of this case by Respondents[1] were based on the Texas Constitution.[2] Since no federal question was raised in the state court proceedings, this Court should deny the Petition for a Writ of Certiorari of the City of Houston.

CONSTITUTIONAL PROVISIONS INVOLVED

The only constitutional provision involved in this case is Article I, Section 17 of the Texas Constitution. Contrary to the assertions of Petitioner, no provision of the United States Constitution is involved. A review of the judgment of the trial court,[3] the findings of fact and conclusions of law of the trial court,[4] and the decision of

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[1] Respondents may also be referred to herein as "Kolb." Petitioner may also be referred to as the "City."

[2] TEX. CONST. ART. I, § 17 provides:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . .

[3] *See* judgment of the trial court at Appendix C to the Petition of the City of Houston.

[4] *See* findings of fact and conclusions of law at Appendix D to the Petition of the City of Houston.

the Fourteenth Court of Appeals of the State of Texas,[5] confirms this fact.

PETITIONER'S MISSTATEMENTS OF FACT OR LAW

a) Respondents pursued state constitutional law claims at the trial of the case.[6] Moreover, the judgment **only** granted relief pursuant to the Texas Constitution. The federal constitution did not play any part in the decision of the Texas state courts.

b) Petitioner misleads this court by stating that all Respondents had to do was reflect the route of the Grand Parkway (State Highway 99)[7] on its application for subdivision plat. *See* Petition at p. 2. The uncontroverted evidence reflects that Respondents' application for a subdivision plat would never be approved by the City unless Kolb dedicated (gave or donated) a right-of-way to the City for a state highway. (RR 21-24; 29-30; 113-115; 126-129; 131-134; & 310-314)

c) Petitioner misrepresents the application of federal law by the Supreme Court of Texas in *Mayhew v. Town*

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[5] *See* opinion of the Fourteenth Court of Appeals at Appendix A to the Petition of the City of Houston.

[6] While the Original Petition filed by Respondents referred to the United States Constitution, Respondents only pursued "taking or damaging" claims pursuant to TEX. CONST. ART. I, § 17 at trial.

[7] The Grand Parkway is a six (6) lane controlled access highway of the State of Texas. *See* Findings of Fact 1 and 2 CR 348.

of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 119 S. Ct. 2018 (1999).[8]

Petitioner, in quoting from the *Mayhew* opinion at page 8 of its Petition, leaves out significant language in the court's opinion in an apparent effort to distort the action of the Supreme Court of Texas and create a false impression with this Court.[9] These deletions are significant because the *Mayhew's* regulatory taking claims were at all times asserted under the Fifth and Fourteenth Amendments of the United States Constitution, to include claims involving federal procedural due process, federal substantive due process, equal protection and federal taking claims. In the instant case, the Kolb judgment is based on a Texas constitutional claim and not any federal claim.

STATEMENT

In 1973, Kolb purchased 640 acres of land for investment purposes. (RR 120, 134) Thereafter, the northern half of the property was developed as a residential subdivision. (RR 121-122) In 1993, Kolb sought to develop the remaining 314 acres of land, which are the subject of this case, as a residential subdivision. (RR 122-123) The Kolb property is located within the extraterritorial jurisdiction (ETJ) of the City. (RR 300) In order for the property to be subdivided within the ETJ of the City, an application for

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[8] Petitioner also fails to inform the Court that it denied the Petition for a Writ of Certiorari in *Mayhew*.

[9] . . . in determining the ripeness of . . . [Petitioner deleted *"Mayhews"*] regulatory taking claims . . . [Petitioner deleted *"in this case"*] we apply federal jurisprudence. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d at 929 n. 1.

subdivision plat must be submitted and approved by the City. (RR 299) (P. Exh. 34) No property may be subdivided within the ETJ of the City unless the City approves an application for subdivision plat. (RR 109, 112, 299-300) Kolb submitted two applications to subdivide their property to the City. (P. Exh. 10, 17) The City, by and through its Planning Commission,[10] denied both applications. (P. Exh. 13, 18) The initial application was denied because Kolb would not dedicate a right-of-way for the proposed Grand Parkway (State Hwy. 99) and due to excessive block lengths. Kolb resubmitted the application eliminating the excessive block lengths but legitimately refused to dedicate a right-of-way for the proposed Grand Parkway. (P. Exh. 17) The sole basis for the denial of the application for subdivision plat on the second and final submission was the fact that Kolb did not dedicate a right-of-way for the proposed Grand Parkway (State Hwy. 99). (RR 29, 30, 113-115, 126-129, 131-134, 310-314)

The Grand Parkway is a controlled access highway (i.e., limited access only) of the State of Texas which is proposed to cross the Kolb property at some time in the indefinite future. (P. Exh. 3; RR 19, 21, 55, 57-59, 78, 303) It is uncontroverted that the subdivision of the Kolb property would increase the acquisition costs of the right-of-way for this state highway. (RR 69, 87) The City made it clear that the Kolb application would *never* be approved unless a right-of-way for the Grand Parkway was dedicated. (RR 113-115, 126-129, 131-134, 310-314) The City

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[10] The Planning Commission is the organization within the City which has the authority to approve or deny subdivision plats. (RR 10).

never retreated from this requirement. (RR 113-115, 126-129, 131-134, 310-314) Petitioner, in its Petition, repeatedly[11] seeks to mislead this Court by implying that all Kolb had to do was draw some lines on a piece of paper to comply with the requirements of the City's Major Thoroughfare Plan and obtain approval of the application. The position of the City was, and has always been, that the dedication of a "right-of-way" for the Grand Parkway was necessary in order to obtain approval of the application for subdivision plat. (RR 113-115, 126-129, 131-134, 310-314) This it had no legal authority to do.

While the City had the exclusive authority to approve or deny the Kolb application for subdivision plat, only the State of Texas had the exclusive authority, pursuant to Texas law,[12] with respect to the location and operation of a controlled access highway such as the Grand Parkway. (RR 25, 300) (RR 304-305) The City, acting in concert with the State, had an established policy of seeking the advice of the Grand Parkway Association, with respect to applications for subdivision plats involving property which might be traversed by the proposed Grand Parkway. (P. Exh. 7; RR 20, 28-29, 46-52)

On August 12, 1993, in response to the City's request, J. L. Coffman, Executive Director of the Grand Parkway Association, advised the City that the Grand Parkway Association objected to the Kolb subdivision plat since it

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[11] *See* p. i, 2, 4, 10 and 11 of the Petition.

[12] *See* Articles 6674w and 6674w-1 of the Revised Civil Statutes of Texas.

would prohibit use of the Grand Parkway alignment corridor as proposed. (P. Exh. 12; RR 61-62) Mr. Coffman and Mr. J. R. Collins, engineering consultant for the Grand Parkway Association, both testified under oath that it was the policy of the Grand Parkway Association to protect the alignment of the Grand Parkway corridor in an attempt to reduce the acquisition costs of right-of-way for the proposed Grand Parkway in the future. (RR 69, 86-88)

Robert Litke, Director of the City's Planning Department, testified that without a dedication of land for the Grand Parkway the Kolb subdivision plat would not be approved by the City. (RR 305-306, 112-114) Mr. Litke further testified that the Grand Parkway is not a major thoroughfare of the City and that the exclusive jurisdiction for a controlled access highway of the State of Texas, such as the Grand Parkway, is with the State Highway Department. (RR 304-305) Additionally, Mr. Litke testified that it would have been futile for Kolb to request a "variance".[13]

Texas law does not permit a governmental entity to deny a development permit in order to decrease the cost

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[13] Mr. Litke testified as follows:

Q. But you couldn't apply for a variance because a variance wouldn't apply?

A. A variance would not apply in this case.

Q. So it would be futile to apply for a variance. We can agree on that?

A. Because a variance would not apply in this case.

(RR 115, l. 14-19)

of future acquisition of land for a public use. This has been held to be a "taking or damaging" under Article I, Section 17 of the Texas Constitution. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978) (denial of permit to protect scenic easement); *State of Texas v. Biggar*, 873 S.W.2d 11, 13 (Tex. 1994) (denial of easement exchange); *San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.) (denial of subdivision plat to lower costs for future dam site and recreational lake).

Pursuant to controlling Texas case law, the Texas courts correctly determined that the actions of the City in denying Kolb's second application for subdivision plat was an unreasonable interference with the right to use and enjoy the property which was done in part to decrease the costs of acquisition of right-of-way for the Grand Parkway and thereby constituted a "taking" or "damaging" of Kolb's property within the meaning of Article I, Section 17 of the Texas Constitution. (CR 313) The Texas Court also correctly determined that the case was ripe.

REASONS FOR DENYING THE PETITION

A. No Jurisdiction.

This Court does not have jurisdiction, as the Kolb claims are not interwoven with federal law, nor do they rest primarily on federal law. The Kolb claims are state claims. The citation of decisions of this Court in a case, cited by the Texas state court does not create federal question jurisdiction.

The cases relied upon by Petitioner[14] to assert federal jurisdiction are not applicable to Kolb's state constitutional claim. Each of the cases cited by Petitioner involve the invasion of First Amendment or Fourth Amendment rights in which the state courts were compelled to apply federal jurisprudence. The Kolb judgment is based upon the application of Article I, Section 17 of the Texas Constitution. Not one federal case is cited by the Fourteenth Court of Appeals in its decision that the Kolb case was "ripe" pursuant to state ripeness requirements. In *Mayhew*, the Texas Supreme Court made it clear that it looked to federal law for "**guidance**" and did not state that it was "**compelled**" to decide the case based on federal law.

Such action by the Texas Supreme Court in *Mayhew* was appropriate because *Mayhew*, at all times, pursued federal constitutional claims, including federal taking, procedural due process, substantive due process and equal protection claims pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. Kolb only pursued state constitutional claims for a "taking or damaging" at trial, and therefore, none of the Texas courts below were required, nor did they indicate any compulsion, to apply federal law to the facts of the Kolb case.

The cases of *Long, Milkovich and Zacchini*, cited by Petitioner do not apply nor create federal jurisdiction in this case.

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[14] *Michigan v. Long*, 463 U.S. 1032 (1983); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

In *Long*, this Court said:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. 463 U.S. at 1041 (1983).

Additionally, Rule 14(g)(i) of the Rules of the Supreme Court of the United States, required Petitioner to state when and the manner in which a federal question was raised in the state courts below. No federal question was ever raised by Petitioner in this case at any stage of the state court proceedings from the entry of judgment through the denial of the Petition for Review by the Supreme Court of Texas. Since no federal question was timely or properly raised, this Court should deny the Petition.

Even if the mere citation of *Mayhew* was enough to confer federal court jurisdiction, the court below correctly decided the case. The city planning commission, the body having the final say, twice denied Kolb's development application. As found by the courts below, any further action (without donating the right-of-way) would have been futile. The case was clearly ripe under state and federal law.[15]

B. No Compelling Reason Exists to Grant the Petition.

No compelling reason exists for granting the Petition. No issue of importance to federal jurisprudence was

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[15] The Texas Supreme Court did not regard this case as worthy of its discretionary review nor should this Court.

presented in this case. This case simply involves the application of well-established Texas law to the facts.

Under Texas law, a governmental entity cannot deny a private development permit to reduce future acquisition costs of the property for a public project.

In *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978), a case involving the denial of a permit for waterway development to protect a scenic easement, the Supreme Court of Texas set out the law applicable in this case:

> "There is still another test which is sometimes helpful. It allows recovery of damages when the government's action against an economic interest of an owner is for its own advantage. *Morris Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A. 2d 232 (1963); *Miller v. City of Beaver Falls*, 368 PA. 189, 82 A. 2d 34 (1951); *Cf. Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531 (1962). A recent application of that test is found in *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.). In that case the City of San Antonio rejected plans for a proposed subdivision because the city was planning sometime in the future to acquire the land by eminent domain for a dam site and a lake or reservoir for recreation purposes. By suppressing development of the area, the City of San Antonio would keep down its costs when it exercised its powers of eminent domain." *Id.* at 393.

This constituted a "taking or damaging" of property under the Texas Constitution.

This rule was restated in *State of Texas v. Biggar*, 873 S.W.2d 11, 14 (Tex. 1994). There the Supreme Court of Texas in holding that the denial of an easement exchange resulted in compensable damages under the Texas Constitution said:

> "Here, Landowners presented evidence the State denied the easement exchange to reduce the cost to the public of acquiring a portion of the Landowners' land. *In the same stroke, the State managed to foreclose all opportunity to develop, causing the concomitant reduction in value of not only the portion taken, but the entire Biggar tract.* We hold the State's actions resulted in compensable damages under Article I, Section 17 of the Texas Constitution." *Id.* at 14. (emphasis added).

This is exactly what the City sought to do in this case.

The Texas Courts below correctly determined that Kolb's claims, under the Texas Constitution, were ripe for determination pursuant to state law. All elements necessary to satisfy the state ripeness requirements stated by the Texas Supreme Court in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 119 S. Ct. 2018 (1999) were met by Kolb. This Court does not sit to examine every state court record to determine "ripeness" under state claims.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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